

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**SBC COMMUNICATIONS INC., SBC DELAWARE)
INC., AMERITECH CORPORATION, ILLINOIS BELL)
TELEPHONE COMPANY d/b/a AMERITECH)
ILLINOIS and AMERITECH ILLINOIS METRO, INC.)**

ICC DOCKET NO: 98-0555

**Joint Application for Approval of the Reorganization of)
Illinois Bell Telephone Company d/b/a Ameritech Illinois,)
and the Reorganization of Ameritech Illinois Metro, Inc.)
in Accordance with §7-204 of the Public Utilities Act)
and for All Other Appropriate Relief)**

INITIAL BRIEF OF INTERVENOR ACI CORP.

NOW COMES Intervenor, Accelerated Connections, Inc. d/b/a ACI Corp. ("ACI"), by and through its attorneys, SORLING, NORTHRUP, HANNA, CULLEN AND COCHRAN, LTD., Scott C. Helmholz, of Counsel, and BLUMENFELD & COHEN, Joan L. Volz, of Counsel, and for its Initial Brief, states as follows:

I. OVERVIEW AND SUMMARY OF THE PARTIES' POSITIONS

ACI is a competitive local exchange carrier ("CLEC") that provides high speed data communications via digital subscriber line ("DSL") technology utilizing the existing copper wire loop network of the incumbent local exchange carriers ("ILECs"), including Joint Applicant Ameritech Corporation ("Ameritech"). Direct Testimony on Reopening of Jo Gentry on behalf of Intervenor ACI Corp., p. 3, lines 7-11 (hereafter cited as "Gentry, p. ____, line ____").¹ ACI depends upon Ameritech for the provision of unbundled copper loops, interconnection and collocation of network facilities, and transport necessary to provide ACI's high-speed data telecommunications to Illinois businesses and consumers. (Gentry, p. 3, lines 13-16). ACI

¹ ACI obtained certificates of authority by Order of this Commission pursuant to §§13-403, 13-404 and 13-405 of the Public Utilities Act, 220 ILCS 5/1-101, *et seq.* (the "PUA"), in Docket No. 98-0289 on June 3, 1998. (Gentry, p. 3, lines 11-13).

petitioned for leave to intervene in this docket pursuant to §200.200 of the Commission's Rules of Practice on June 16, 1999, and its Petition was granted by the Hearing Examiners on July 13, 1999.

ACI filed the direct testimony of its Director of National Deployment, Jo Gentry, in response to Chairman Mathias' June 4, 1999 letter to Examiners Goldstein and Moran indicating his desire that the parties provide " . . . possible conditions which would ameliorate . . . Commissioner's concerns regarding the local exchange market in Illinois . . ." In her testimony, Ms. Gentry proposed that the Commission impose the following four (4) types of conditions on Joint Applicants pursuant to §7-204(f) of the PUA:

1. The Joint Applicants should be required to work with Commission staff and CLECs to develop an xDSL-capable loop offering within the next 45 days that is not length or technology restrictive and is available to all CLECs.
2. The Joint Applicants should immediately make available on a pre-ordering basis data regarding loop characteristics and makeup.
3. The Joint Applicants should be prohibited from providing their xDSL services to customers in any central office where a data CLEC can demonstrate to the Commission that Joint Applicants are routinely unable to provision 90% or more of the loops ordered for the provisioning of advanced services.
4. As a best practice, Joint Applicants should be required to make available to any requesting CLEC any term or condition in any interconnection agreement, arbitration decision, or other state commission or court ruling that applies anywhere in their regions.

(Gentry, p. 2, lines 16-29).

For their response to Ms. Gentry's testimony, Joint Applicants filed "Rebuttal Testimony on Reopening of Curtis Hopfinger". (SBC-Ameritech, Exhibit 11.2, hereafter "Hopfinger, p. _____, line _____). Mr Hopfinger's testimony also purported to rebut the Direct Testimony

of Clay Deanhardt on behalf of Intervenor COVAD Communications. (COVAD Exhibit No. 1).

At the hearing conducted in this matter in Chicago on July 13, 1999, Ms. Gentry's testimony (ACI Exhibit 1.0) was received into evidence without objection or cross-examination.

II. ARGUMENT

A. *Requiring the immediate development of an xDSL-capable loop definition without length or technology restrictions will promote competition in the local exchange market for advance services.*

Jo Gentry's unrebutted testimony establishes that Ameritech's loop definitions contain length and technology restrictions that unreasonably hinder ACI's ability to order the "clean" loops necessary to provision DSL. (Gentry p. 7, lines 6-7; p. 8, lines 4-7). Ameritech defines loops by incorporating by reference the characteristics of a limited number of DSL "flavors" (e.g., "ADSL" or "HDSL"), instead of simply providing the loop make-up (e.g., loop length in 26 gauge equivalent, presence of load coils, bridged taps, repeaters, DAML's, or DLC). This hampers ACI's deployment of DSL alternatives and becomes a "roadblock" to competition.

The Commission can alleviate this competitive roadblock by simply requiring Joint Applicants to work with CLECs and Commission Staff to agree on an xDSL-capable loop definition that has no length or technology restrictions within forty-five (45) days of merger closing. The Commission should order that if no agreement is reached within the forty-five day period, the "default" definition will be the xDSL-capable loop contained in ACI's Petition to Modify Southern New England Telephone Company's ("SNET") Connecticut xDSL tariff, which the Connecticut Department of Public Utility Control ("CDPUC") adopted on an interim basis

on July 8, 1999.² Even when loops meeting Ameritech's length limitations are available, Ameritech frequently attempts to impose exorbitant "special construction" charges that render the loops economically out-of-reach. If any bridged taps, load coils, repeaters or BRITE cards must be added to or removed from the loop, Ameritech charges non-TELRIC "special construction" charges for this "conditioning." (Gentry, p. 8, lines 13-21). Conditioning is a routine practice incumbents provide their own retail customers at no charge (Gentry, p. 9, lines 8-12; see also, Direct Testimony on Reopening of David R. Conn, McLeod USA Exhibit 1, at p.5). The practice of charging CLECs for loop conditioning/deconditioning is therefore unquestionably discriminatory and contravenes the public policy expressed in §13-103(d) that ". . . consumers of telecommunications services and facilities . . . should be required to pay only reasonable and *non-discriminatory* rates and charges." (emphasis added).

Special construction or loop conditioning charges are especially unwarranted in a TELRIC pricing environment because an efficient forward-looking network includes xDSL-capable facilities that would not require conditioning. (Gentry, p.9, lines 14-18; Conn, p. 5). In a recent complaint case in which it assessed a fine, costs, and attorneys' fees against Ameritech, the

² The CDPUC agreed with ACI's contention that the SNET proposed xDSL tariff "would restrict the types of advanced services that competitive local exchange carriers . . . can offer" and concluded that if it approved SNET's proposal ". . . the offering of xDSL services in Connecticut by providers other than the Telco will be delayed." Advisory Letter Ruling, Docket No. 98-11-10, July 8, 1999. The Commission may take administrative notice of this Order that issued two days after the intervenors' deadline for filing testimony in the reopening phase of this docket pursuant to §200.640 (a)(1) of the Commission's Rules of Practice. (Both the Advisory Letter Ruling and the xDSL-capable loop definition from the "red-lined" interim tariff are attached at Tab 1.)

Michigan Public Service Commission found “. . . it is unreasonable for Ameritech Michigan to suggest that a network constructed on the basis of long run, forward looking costs would not have sufficient spare capacity to permit the provisioning of unbundled loops as normal, routine work.”

In the matter of the Complaint of BRE Communications, L.L.C., d/b/a Phone Michigan against Ameritech Michigan, Michigan PSC Case No. U-11735, February 9, 1999, p. 24 (1999 Mich. PSC LEXIS 22). The Commission also found discrimination in “Ameritech Michigan’s determination that under certain circumstances it can require BRE to pay special construction charges in connection with the provisioning of an unbundled loop when, under identical circumstances, it routinely foregoes the collection of such charges from its own customers . . .” Id. at p. 30.

Likewise, in rejecting SBC subsidiary SNET’s proposed xDSL tariff, the Connecticut Department of Public Utility Control agreed with ACI and MCI WorldCom’s contentions that SNET’s “line conditioning and qualification charges are excessive, unjustified and contrary to forward-looking costing principles.” Advisory Letter Ruling, Docket No. 98-11-10, July 8, 1999, (Tab 1). The Connecticut DPUC accordingly ordered SNET “to submit a revised xDSL tariff that is identical to the redlined version proffered by ACI . . . [and] will permit, subject to a true-up, the ACI-proposed rates, charges and terms and conditions to go into effect . . .”

In light of the foregoing, ACI proposes that the xDSL-capable loop definition proposed as a merger condition herein clearly exclude any charges for loop conditioning or any other marginal cost arising out of revisions to the ILEC network necessary to provision individual unbundled loops.

B. Requiring Joint Applicants to begin providing pre-order access to loop make-up information will facilitate the timely development of effective competition.

Because Ameritech refuses to provide pre-ordering access to loop information, ACI is put in the position of serially requesting loops using Ameritech's outdated and technologically nonsensical loop definitions until hitting upon the correct combination of Ameritech's loop language and customer specifications. (Gentry, p. 13, lines 3-5). The Commission can eliminate these anti-competitive roadblocks by requiring the Joint Applicants to begin providing CLECs, on a pre-ordering basis, with access to any and all loop make-up information currently existing in any OSS ("operational support system") and associated databases, such as Ameritech's loop facilities assignment and control system or "LFACS". (Gentry, p.14, line 13). SBC's Pacific Bell subsidiary currently provides make-up information on a pre-ordering basis to CLECs at no charge. (Gentry, p. 14, lines 21-22). The Commission should require that Joint Applicants immediately provide the access currently provided by Pacific Bell and that Joint Applicants make available full unfiltered access within six months.

By requiring Joint Applicants to provide pre-ordering access to loop make-up information, CLECs will be better able to make effective business decisions that will result in the best possible service to customers. (Gentry, p. 11, lines 16-19). By obtaining pre-order access to existing loop data, ACI can set appropriate customer expectations for available data transmission speeds and determine which of the various xDSL technologies best meets the customer's circumstances. (Gentry, p. 12, lines 12-21).

ACI and similarly-situated advanced services providers should have the ability to offer Illinois consumers all varieties of DSL service without the hindrance of data filters tailored to suit

Ameritech's limited DSL offerings. By requiring Joint Applicants to provide access to all loop data residing in existing data bases, regardless of whether Ameritech accesses the data for the provisioning of its own services, the Commission can dramatically accelerate the deployment of competitive telecommunications services to Illinois businesses and residential consumers in furtherance of the public policy encouraging the promotion of "effective and sustained competition in all telecommunications markets". §13-103(f).

C. Imposing limitations on Joint Applicants' provision of DSL services eliminates economic incentives that reward delay.

Two economic incentives encourage the Joint Applicants to block CLECs from provisioning advanced services in a timely manner. First, to protect their “hicap” (e.g., DS1 and DS3) and design data services, the Joint Applicants have an economic incentive to delay the introduction of substitute services such as xDSL. Second, by providing slow or delayed service to the data CLECs, the Joint Applicants give themselves more time to roll-out competing services such as “Speedpath”, (Ameritech’s DSL offering). ACI’s proposed limitation on the timing of Joint Applicants’ roll-out of their own xDSL products removes these incentives to delay. With this condition on the merger, the Commission would effectively remove the current incentives for Joint Applicants to engage in dilatory behavior.

Ameritech may prefer to continue to provide high-margin T-1 services to data users, rather than undercut this profitable line with DSL offerings which are subject to competitive pricing pressure. (Gentry, p. 15, lines 10-14). For that reason, it is not enough to impose restrictions on Ameritech’s retail DSL offerings.

Additional proactive measures are required to stimulate Joint Applicants to provide the full range of facilities and services that ACI and other data CLECs require to deliver advanced service offerings in Illinois. ACI is sensitive to the Commission’s concerns regarding residential customers’ access to data services. The Joint Applicants’ likely strategy in implementing its DSL services is to target first the high margin nonresidential customers. These are the same customers often targeted by CLECs. To minimize the impact on residential customers while targeting the incentive to the Joint Applicants’ likely business plan, this condition should apply to Joint Applicants’ provision of

advanced data services to business customers only and should not restrict their roll-out of advanced services to residential customers.

The possibility of using liquidated damages arose during the proceeding as a potential check against bad acts committed by the Joint Applicants. ACI does not oppose the imposition of liquidated damages. Liquidated damages are a legitimate option for enforcing interconnection requirements where set fairly and enforced. However, precluding the Joint Applicants' advanced services offerings until and unless the recommended conditions are met would be a stronger incentive than liquidated damages. Further, it would allow for customers to receive service from alternate providers during a period of Joint Applicants' non-compliance.

D. Best Practices Requirement

The Joint Applicants have proposed that only terms or conditions which they have voluntarily adopted in other states be made generally available in Illinois. This does not promote competition to the same extent possible that would be the case if the requirement were broadened to include all state commission orders, arbitrations and court decisions regarding the Joint Applicant's interconnection offerings and procedures throughout their territories. Just as Joint Applicants will strive to select the best practices and apply them uniformly to their operations, CLECs should be able to obtain and utilize the equivalent "best decisions" uniformly throughout Joint Applicants' service franchises to promote advanced services. For example, two arbitrations before the Texas Public Utilities Commission involving ACI, COVAD and SBC-Southwestern Bell Telephone Company, (Docket Nos. 20226 and 20272) required substantial investment of Commission time, significant CLEC legal fees, and vast technical and operational testimony in the CLECs' attempt to establish that

loop-type restrictions are unnecessary, that national loop standards (*e.g.*, ANSI) are essential, and that significant loop make-up data is readily available to SBC-Southwestern Bell and should be made available to all CLECs. (Gentry, p. 16, lines 12-16).

This Commission need not spend its limited resources duplicating this lengthy process. If CLECs cannot import arbitration findings developed on the basis of complex records such as that of the Texas arbitration, the xDSL industry will be stunted and only Joint Applicants' approved criteria and offerings would be available to Illinois consumers. This situation would not encourage a competitive or creative DSL environment and certainly would not foster new technology or innovative pricing. In addition, to require each CLEC to negotiate against the largest telecommunications company in the world, with its virtually unlimited financial and technical resources and monopoly control over the legacy telecommunications infrastructure, will delay the positive effects of competition envisioned by the 1996 Act and the FCC's Advanced Services Order.

Joint Applicants contend that because their commitment to provide "services, facilities, or interconnection agreements/arrangements that SBC has voluntarily negotiated in other states" goes well beyond the requirements of the '96 Act, ACI's proposal to allow the "importation" of arbitrated agreements is unreasonable. (Hopfinger, pp. 1-2). Joint Applicants further contend that requiring them to provide terms and conditions they objected to and chose to arbitrate in other jurisdictions "would seriously infringe on the Joint Applicants' rights and obligations under Section 251(c)(1) and Section 252 of the Act to negotiate an interconnection agreement, not to mention possible 'due process' rights." (Hopfinger, p. 2, lines 3-5).

Joint Applicants' invocation of a "due process" specter likewise fails. As long as adequate

provisions are made to allow Joint Applicants just and reasonable compensation³ for the imported term or condition and an opportunity to demonstrate that the condition is not technically feasible in Illinois, there is no due process violation in requiring the provision of arbitrated terms from foreign jurisdictions. There is more than ample evidence in the record that the length of time and cost of obtaining terms and conditions through arbitration delay CLECs from furnishing advanced services to consumers. Thus, it is questionable that denying such a condition may be a better example of denying due process than what the Joint Applicants assert.

Joint Applicants' suggestion that any delays attributable to arbitration result solely from CLECs' business decisions to forego negotiation in favor of arbitration is (1) spurious and (2) misses the point. If CLECs accept an interconnection agreement that contains, for example, the defective loop definitions described in Jo Gentry's testimony, they may still incur substantial delays and impediments to service. Thus, in either scenario, there are delays in the availability of competitive local exchange services that this Commission has a legislative mandate to ameliorate. ACI's proposed conditions redress both of these delay mechanisms by correcting the loop definition problem and allowing the importation of arbitration awards.

Joint Applicants also suggest “. . . the Commission should not want to abdicate its responsibility to review Illinois interconnection agreements from an Illinois perspective by automatically adopting the policies of other states.” Joint Applicants' Response to Commission's

³ This concern can be satisfied by allowing the imported term to be priced in accordance with the “exporting” state's schedule subject to a true-up proceeding to address Illinois-specific cost issues. The Connecticut DPUC used this approach in adopting ACI's interim revised xDSL tariff in Docket No. 98-11-10, discussed above.

June 4 List of Issues, p. 8. Although couched in terms of preserving the Commission's oversight of interconnection agreements, this statement actually reveals Joint Applicants' desire to delay and impede the development of competition for advanced services in Illinois' local exchange markets by continually relitigating unfavorable arbitration awards. If this Commission chooses to condition the merger by allowing the "importation" of arbitrated terms or conditions, it will not have "automatically" adopted the policies of the arbitration's forum state. Instead, the Commission will have elected, using this record as a reasoned basis, to utilize its 7-204(f) powers to implement its own policy of eliminating the roadblocks to competition in Illinois' market for advanced telecommunications services occasioned by lengthy arbitration proceedings. To the extent the Commission deems it necessary, it could readily retain oversight powers by requiring a notice filing of any CLEC's intention to import an arbitration award.

III. THE COMMISSION HAS AMPLE JURISDICTION AND AUTHORITY TO IMPOSE CONDITIONS

A. §7-204(f) Basis - Protecting the Interest of CLECs and Consumers as Public Utility Customers

§7-204(f) of the PUA authorizes the Commission to ". . . impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers". While §13-601 exempts CLECs from the obligatory provisions of Article VII, CLECs (as well as retail consumers) are nonetheless "customers" within the meaning of §7-204(f) by virtue of their purchase of unbundled network elements, collocation and transport from the ILEC. The term "telecommunications service" as used in §§13-102 and 13-103 "includes access and interconnection arrangements and services." §13-203. Consequently, the Commission has ample authority to impose conditions on Joint Applicants to protect the interest of both CLECs

and retail consumers as “public utility . . . customers”. By imposing conditions that ensure Joint Applicants will better serve their CLEC customers’ needs for telecommunications services, the Commission will successfully protect the interests of CLECs and the public.

Joint Applicants suggested earlier in these proceedings that the General Assembly’s pronouncements in §§13-102 and 13-103, being “prefatory”, are entitled to little or no weight citing Monarch Gas Co. v. Illinois Commerce Commission, 261 Ill.App.3d 94, 633 N.E.2d 1260, 199 Ill.Dec. 269 (5th Dist. 1994) and Governor’s Office of Consumer Services v. Illinois Commerce Commission, 220 Ill.App.3d 68, 580 N.E.2d 920, 162 Ill.Dec. 737 (3rd Dist. 1991).

While Joint Applicants have correctly cited these cases, they ignore the Court’s observation in Governor’s Office that:

“[s]uch provisions are available for clarification of ambiguous substantive portions of the act . . .” 162 Ill. Dec.737, 740.

Accordingly, to the extent Joint Applicants make any attempts to restrict or limit this Commission’s authority under §7-204(f), the findings and public policies enunciated in §§13-102 and 13-103 become relevant. Further, there can be no question that Articles VII and XIII of the PUA legislate on related subjects and “. . . it is proper to compare statutes *in pari materia* or to consider statutes on related subjects in ascertaining legislative intent.” Illinois-Indiana Cable Television Assn. v. Illinois Commerce Commission, 55 Ill.2d 205, 302 N.E.2d 334, 342 (1973).

The Commission thus has clear authority to impose the conditions proposed by ACI.

B. §13-103(f) Basis - Promoting Effective and Sustained Competition

In §13-103(f) of the PUA, the General Assembly declared “. . . that it is the policy of the State of Illinois that: (f) development of and prudent investment in advanced telecommunications services and networks that foster economic development of the State should be encouraged through

the implementation and enforcement of policies that promote effective and sustained competition in all telecommunications markets”. By imposing ACI’s proposed conditions, the Commission would unquestionably “promote effective and sustained competition”.

C. §13-102(e) Basis - Effectively Realizing the Benefits of Competition

§13-102(e) of the PUA provides that:

“it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible.”

ILEC acts and practices that unreasonably hinder and delay the provision of advanced telecommunications services to Illinois consumers clearly jeopardize the “immediate interest of the People” in effective competition in this rapidly developing market. By providing slow or delayed service to their data CLEC customers, Joint Applicants gain an unfair competitive advantage for their own competing DSL service. (Gentry, p. 15, lines 14-16).⁴ If the Commission requires Joint Applicants to promptly implement ACI’s proposed conditions, it would truly act in the “immediate interest of the People of the State of Illinois” as declared by the General Assembly in §13-102(e).

D. §13-103(a) - Just and Reasonable Rates

⁴ An Ameritech press release posted on its website (www.ameritech.com) on July 21, 1999, announced “a strategic alliance to provide broadband digital subscriber line access to the AOL (America Online) service . . . [which] . . . will accelerate installation of Asymmetric Digital Subscriber Line (ADSL) technology into phone switching centers that will serve 8 million homes by the end of 2001.”

§13-103(a) of the PUA declares that:

telecommunications services should be available to all Illinois citizens
at just, reasonable and affordable rates . . .

By assessing special construction charges, Ameritech effectively prevents many Illinois consumers from obtaining advanced telecommunications such as DSL. Given that many of these charges are for loop “conditioning” that is not only technically feasible but routinely performed at no charge for Ameritech’s retail customers (Gentry, p. 9, lines 8-12), assessing them against CLECs renders them *per se* unreasonable and unjust. Once again, this proceeding allows the Commission a perfect opportunity to promote competition by prohibiting Joint Applicants from assessing special construction charges for loop conditioning.

E. §706 of the Federal Telecommunications Act of 1996

In Section 706 of the Telecommunications Act of 1996, Congress provided that the FCC

“ . . . and each State commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment”. (emphasis added.)

ACI’s proposed merger conditions clearly constitute “measures that promote competition” and would “remove barriers to infrastructure investment” in furtherance of the Congressional intent expressed in §706.

IV. SUMMARY AND CONCLUSION

Adoption of ACI’s proposed merger conditions would unquestionably facilitate the deployment and availability of advanced services to Illinois consumers at competitive prices. In

the absence of such conditions, the SBC-Ameritech merger will harm the development of competition for advanced services in local exchange markets because of SBC's stated desire to require that CLECs pursue lengthy and costly arbitration to obtain interconnection terms already provided pursuant to arbitration awards or court orders in other states. Failure to seize this opportunity to impose conditions on Joint Applicants' reorganization plan will result in further delay in the availability of competitive telecommunications products and advanced services in Illinois.

Respectfully submitted,

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By: _____
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